

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF GROSSE POINTE PARK,

Plaintiff-Appellee/Cross-Appellant,

v

MICHIGAN MUTUAL LIABILITY &
PROPERTY POOL,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

October 30, 2003

No. 228347

Wayne Circuit Court

LC No. 98-806998-CK

Before: O’Connell, P.J., and White and Cooper, JJ.

O’CONNELL, J. (*concurring in part and dissenting in part*).

I concur that the trial court erred when it denied defendant’s motion for summary disposition, but I respectfully disagree with the majority’s opinion that, despite a lack of ambiguity or estoppel, the parties’ dealings outside the contract override a clearly applicable exclusion. Therefore, I dissent from that portion of the majority’s opinion that considers the parties’ extraneous dealings relevant and remands the case for further consideration rather than entry of judgment in defendant’s favor.

The policy exclusion at issue states that “this coverage . . . does not apply to . . . Bodily Injury or Property Damage arising out of the . . . discharge of pollutants . . . from any premises . . . owned or occupied by [plaintiff].” The policy defines pollutants as, “any solid, liquid, gaseous or thermal irritant or contaminant, including . . . chemicals and waste.” The policy adds, “Waste includes materials to be recycled, reconditioned or reclaimed.”

I note that we are not the first court in Michigan to analyze whether the pollution exclusion at issue here contains an ambiguity or applies when a city floods homes with waste water. Reviewing an identical insurance provision, we stated that the exclusion’s language was unambiguous. *McGuirk Sand & Gravel, Inc v Meridian Mutual Ins Co*, 220 Mich App 347, 354-355; 559 NW2d 93 (1996). Citing *McGuirk*, a recent federal case applied Michigan law and further held that a city’s discharged sewage qualified as “waste” under the same exclusion language we see here. *United States Fire Ins Co v Warren*, 176 F Supp 2d 728, 732 (ED Mich, 2001).

The majority opinion apparently concedes these issues, but still remands with orders to hunt for ambiguities in the parties’ extraneous actions. This resolution runs contrary to our role

of applying the language of a contract without regard to such peripheral, extrinsic evidence. *UAW-GM v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998). I acknowledge that *Michigan Miller v Bronson Plating*, 197 Mich App 482; 496 NW2d 373 (1992), overruled in part on other grounds ___ Mich ___; 664 NW2d 776 (2003), suggests that a party may always use extrinsic evidence of the parties' extraneous actions to illuminate hidden ambiguities. But the better and more often applied rule is that after analyzing the contract and finding no patent ambiguity, a court may only consider extrinsic evidence to discern and resolve a latent ambiguity. *Zilwaukee Twp v Saginaw-Bay City R Co*, 213 Mich 61, 71-72; 181 NW 37 (1921). This rule works in tandem with the understanding that a latent ambiguity is an ambiguity that arises when the court's application of the contract's plain language to a case's peculiar facts leads to multiple reasonable but mutually exclusive conclusions that are all completely consistent with the contract's language. *Id.* Only after finding such a latent ambiguity may a court then turn to extrinsic evidence regarding the parties' intent. *Id.*

The majority opinion skips the essential step that only allows use of limited extrinsic evidence (facts regarding plaintiff's sewage discharge) to determine if the contract's language "could reasonably be understood in different ways." *Raska v Farm Bureau Mut Ins Co of Michigan*, 412 Mich 355, 362; 314 NW2d 440 (1982). Instead, it sends the trial court venturing beyond the contract's bounds in search of potential ambiguities that may lurk among the parties' extraneous dealings. Straightforward application of the contract's plain language results in the inescapable conclusion that the parties intended to exclude coverage for waste water discharge, so the trial court's venture could only result in a finding *inconsistent* with the contract's clear language. Therefore, a deeper delve into extrinsic evidence is neither productive nor permitted. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 338; 632 NW2d 525 (2001). No latent ambiguity exists here, so the contract is closed to judicial renovation. *Id.*

The majority opinion also misapplies the estoppel doctrine. Barring egregious, inequitable action by the insurer, the doctrine does not apply to expand a policy's express coverage. *Kirschner v Process Design Associates, Inc*, 459 Mich 587, 594; 592 NW2d 707 (1999). Rather, the law calls us to apply clear exclusions as written. *Group Ins Co v Czopek*, 440 Mich 590, 597; 489 NW2d 444 (1992). We have previously held that the payment of benefits on a claim did not render inequitable the later assertion of a policy's exclusion against that claim. *Calhoun v Auto Club Ins Ass'n*, 177 Mich App 85, 441 NW2d 54 (1989). Plaintiff argues an even weaker case for estoppel here. Plaintiff cites defendant's various methods of handling other factually distinct policy claims as the inequitable behavior that prejudicially induced it to reasonably believe defendant would pay the instant claims. Plaintiff makes this argument despite the fact that defendant preemptively retained its right to assert the pollution exclusion against the present claims. Because plaintiff fails to show that defendant's behavior rose even to the level of inequity found insufficient in *Calhoun*, it follows that the trial court erred when it applied estoppel to this case, and the majority errs when it holds that a question of fact exists regarding estoppel's potential applicability.

Because the contract does not contain any ambiguity and estoppel clearly does not apply, I would apply the contract's language as written and remand for an entry of judgment in defendant's favor.

/s/ Peter D. O'Connell